IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.117 OF 2006

IN

SUIT NO.35 OF 1996

IN

PETITION NO.84 OF 1993

K.R. Alpaiwala and others ...Petitioners

v/s

S.M. Khansaheb and others ...Respondents

Mr R.M. Bagaria for Petitioners.

Mr G.R. Joshi i/b Mr B.G. Saraf for Respondent Nos.3 and 4.

CORAM : D.K. DESHMUKH J.

DATE : 11TH JANUARY 2007.

P.C. :-

1. This notice of motion has been taken out by the defendants in the suit for certain directions. An objection is raised to the maintainability of the motion on behalf of Aspi Byramji Anklesaria, who is shown in the notice of motion as defendant No.4 that the present motion is not maintainable because all the plaintiffs who had filed this suit have expired. The suit was filed by them in their capacity as executors of the will left behind by B.R.B. Vakil and therefore, on the death of the executors, the right to sue does not survive and therefore, on the death of all the executors, the suit abets and as the suit has abetted, the motion taken out in the said suit is not maintainable. The learned counsel appearing for defendants however submits that the suit does not abet but he is not able to point out any provision of law because of which either it can be said that the right to sue continues after the death of all executors who have filed probate petition which has been converted into a suit. The learned Single Judge of this Court in a judgment in the case of Manekji Manchersha Javeri v/s Phiroze Boman Javeri, reported in 1969 BLR 21 has already held that when a petition is filed by executor named in the will, on the death of executor, the right to sue does not survive. Therefore,

as the plaintiffs in civil suit are admittedly dead and it is also not dispute that the original petition was filed by them for probate of the will of the deceased in the capacity as executors as named in the will, the suit will abet and therefore, obviously notice of motion in the suit, which does not remain pending for interim orders, cannot be entertained. Notice of motion is disposed off.

2. The learned counsel appearing for Aspi Byramji Anklesaria, who is shown as defendant No.4, submits that his client has been unnecessarily dragged to the Court. He submits that though in the petition his client was shown as one of the heirs, he had filed an affidavit consenting to the grant of probate and therefore, was not a party to the civil suit. Therefore, the present plaintiffs were not justified in joining him as party to the motion though he was not a party and though the motion itself was not maintainable and therefore, he should be paid cost. The learned counsel appearing for plaintiffs, on the other hand, submits that because in the notice of motion he was claiming orders in relation to the estate of the deceased and as the defendant No.4 was one of the heirs, he has joined him as a party. The notice of motion is taken out in the civil suit, therefore, only persons who are parties to the civil suit, could have been joined as parties to the motion.

I have found that the action of the plaintiffs of taking out this motion itself was misconceived and ill-advised. Therefore, There is substance in the submission made on behalf of the defendant No.4 that the defendant No.4 has unnecessarily been dragged to the Court. The defendant No.4 therefore would be entitled to cost from the plaintiffs. The plaintiffs are directed to pay to the defendant No.4 in the motion - Aspi Byramji Anklesaria an amount of Rs.10,000/- as costs. Costs to be paid within four weeks from today.

. Parties to act on a copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.